

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

CAUSE NO. 161 OF 2016

STEPHEN NJUGUNA KAMURI.....CLAIMANT

VERSUS

THE BOARD OF MANAGEMENT

KIBUTHA MIXED DAY SECONDARY SCHOOL.....RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent for his alleged constructive termination of employment. The Claimant averred that he was employed as a night watchman by the Respondent around 2013 earning a monthly salary of Kshs. 5,500/-. He averred that the sum was below the statutory minimum wage and averred that the Respondent made allegations that there was theft of assorted items in the school on the night of 20th May 2015 causing his arrest on 21st May 2015. He averred that he was charged with the offence of breaking into a building and stealing vide Kangema PMC criminal Case No 413/15 which matter was withdrawn because the Respondent had not supplied the Police with supporting documents to mount the prosecution. The Claimant averred that since the day of arrest the Respondent did not pay him any salary and that the conduct by the implies that he was constructively dismissed. He averred that NSSF contributions by the Respondent commenced in May 2014 and that consequently he is entitled to recover the withheld contributions for 14 months. The Claimant averred that he was such a dedicated servant that the Respondent seemed it fit to enrol him for training and that he did not disappoint and was awarded a certification of participation. The Claimant averred that he worked continuously including public holidays without leave, rest day and was not paid in lieu thereof during the subsistence of his employment. He thus claimed these benefits and prays for judgment against the Respondent for a declaration that his termination was unlawful for breaching procedure. He sought maximum compensation for loss of employment – Kshs. 124,000/- , 1 month's salary in lieu of notice Kshs. 12,000/-, pay for annual leave not taken – Kshs. 16,800/-, 106 rest days – Kshs. 42,400/-, 20 public holidays – Kshs. 8,000/-, house allowance – Kshs. 104,000/-, salary underpayment – Kshs. 169,000/-, unremitted NSSF deductions – Kshs. 5,600/-, making a total of Kshs. 481,800/- as well as costs of this suit.

2. The Respondent in its memorandum of response averred that the Claimant was a parent at the school and upon his request was attached to the school security on his own volition albeit with a small daily token to reimburse school fees balance accrued on the account of his child who was a student in the school. The Respondent averred that it have never at any time or at all entered into a contract of employment whether oral or written with the Claimant and categorically denied that he was their employee. It averred that the enrolment to the training the Claimant averred about was entirely the participants own initiative, accord and volition. The Respondent admitted that the Claimant was arrested and arraigned on probable and reasonable grounds of suspicion founded on honest and lawful belief that he had committed an offence punishable by law. The Respondent considered alternative dispute resolution and resolved to forego the criminal proceedings granted that the Claimant was a parent and a neighbour to the Respondent. The Respondent averred that the Claimant is not entitled to any benefits as alleged in the claim or at all and prayed that his suit be dismissed with costs.

3. The Claimant appeared for the hearing and opted to rely on his statement and the documents he had filed. The Respondent did not turn up at the hearing. The Claimant submitted that his termination was unfair and irregular as it did not meet the threshold set out in Section 45 and Section 41 of the Employment Act. He submitted that he was not issued with a notice prior to dismissal and that the employer failed to follow the right procedure before the unlawful termination. He submitted that the dismissal violated Article 50 of the Constitution because there was no fair hearing. The Claimant submitted that the letter from the Police clearly indicated that the school never produced documents in connection with the alleged theft and he argued that the termination was therefore implied with no reasonable reason hence unfair and unlawful. The Claimant submitted that since the dismissal undertaken in an inhumane manner and because he had proved his case on a balance of probabilities, his claim should be allowed as prayed.

4. The Claimant was an employee of the Respondent but was dismissed after the alleged theft of items from the principal's office. The Claimant was charged in a court of law but was acquitted after the Respondent failed to avail documentation in respect of the alleged theft. He avers that his salary was withheld from the date of arrest to date. He was not constructively dismissed as he asserts but his services were terminated without notice. The Respondent may have had grounds to terminate him after the theft for either failing to prevent the theft or for being complicit. It however must comply with the provisions of Section 41 of the Employment Act by ensuring the employee is given notice and allowed a fair and reasonable chance to a hearing. The question therefore arises as to whether the dismissal of the Claimant was fair or not. Section 45(2) of the Employment Act defines unfair termination to include termination by an employer with failure to prove that the reason for termination is valid, that the reason for termination is a fair reason, relating to the employee's conduct, capacity or compatibility and that the employment was terminated in accordance with fair procedure. Upon a misconduct being reported the employer must make an enquiry into the matter and allow the employee to show cause why employment should not be terminated and ensure the employee is given a hearing as provided for in law. Where an employer fails to follow the mandatory provisions of Section 41, the outcome of the process of dismissal is bound to be unfair as the employee is not accorded a hearing either in the presence of the employee's representative or a union representative. In this case the rules of natural justice were abridged as the Claimant was denied the safeguards of the law. He was not issued with a notice to show cause as required. The answer to the question posed above is that the dismissal of the Claimant's services by the Respondent was therefore unfair and unlawful. Taking into account the abrupt manner in which his employment was terminated, the fact that he was incarcerated and charged for no good reason since the Respondent did not avail evidence for the criminal trial, I will award the

Claimant 6 months' salary as compensation as well as the costs of the suit. The claims in regard to the unpaid overtime, underpayment, leave dues and public holidays are continuing wrongs and the Claimant ought to have moved the court within the period stipulated under Section 90. In respect of 2016, he did not particularise the sums owed for each head and prove the same and as such the claim for 2016 is also not capable of grant. In the premises I enter judgment for the Claimant against the Respondent for:-

- a) 6 month's salary being compensation for unlawful dismissal Kshs. 33,000/-;
- b) Costs of the suit which I cap at Kshs. 20,000/-;
- c) Interest on the sum in a) above from the date of judgment till payment in full.

It is so ordered.

Dated and delivered at Nyeri this 16th day of July 2019

Nzioki wa Makau

JUDGE

I certify that this is a

true copy of the Original

Deputy Registrar